Kraas Solutions Sdn Bhd v Konsesi Kota Permatamas Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1102–06 OF 2017
BADARIAH SAHAMID, MARY LIM AND YEOH WEE SIAM JJCA
28 MARCH 2018

Contract — Privity — Building contract — Consession agreement to carry out design, development, construction and maintenance of facilities and infrastructure — Relationship between main contractor, subcontractor and employer — Subcontractor delivered items at employer's premises — Whether general property in goods vested contractor — Right to remove the goods — Whether claim for restitution should be allowed

Pursuant to a concession agreement ('CA') entered into between the plaintiff ('the respondent') and the Government of Malaysia and Universiti Teknologi Mara ('UiTM'), the plaintiff was granted a concession for a period of 23 years to carry out the design, development, construction and maintenance of the facilities and infrastructure for a university campus in UiTM Rembau, Negeri Sembilan. The plaintiff appointed Tech Art Sdn Bhd ('Tech Art') as the main contractor. Tech Art, in turn, issued a letter of award to Novanexus Design Studio as its subcontractor. Unknown to the plaintiff, Novanexus Design Studio entered into arrangements with another entity ('Novanexus Design and Build Sdn Bhd') and they then jointly and/or severally entered into arrangements with the defendant ('the appellant'). These arrangements were evidenced by purchase and delivery orders and invoices and a supply of carpentry work agreement between Novanexus and the defendant ('the CSA'). According to the defendant, it delivered the goods to the project site and the goods were now in the plaintiff's possession. The plaintiff contended that the general property in the goods delivered by the defendant to the UiTM campus was now vested in the plaintiff. The plaintiff filed a claim at the High Court and maintained that they were forced to file this action as the defendant intimated a desire to remove the goods from the project site which would have been a potentially disastrous event for the plaintiff who was bound to deliver the physical possession of the goods to UiTM. On the other hand, the defendant asserted that they had a right to remove the goods. The defendant filed a counterclaim for payment of or judgment for the value of the goods delivered to the plaintiff or, alternatively, for restitution under common law and s 71 of the Contracts Act 1950, or return of the goods. The High Court allowed the plaintiff's claim and dismissed the defendant's counterclaim. Hence, the present appeal.

Held, allowing the appeal and counterclaim in part:

(1) The defendant's relationship arose under the CSA, made between the defendant and Novanexus. The defendant's delivery of the goods contracted under the CSA was made pursuant to the CSA. Such delivery to Novanexus who, in turn supplied the goods, to Tech Art and from Tech Art to the plaintiff did not, ipso facto, render the supply one made under any contractual relationship between the defendant and the plaintiff, not even one under the PAM works contract. This was regardless of Tech Art's relationship with the defendant. In any case, Tech Art was never a seller of the goods; it was the main contractor for the CA (see para 19).

(2) The supplementary agreement and the CSA were entirely different contracts made for different purposes. The supplementary agreement was far from being a contract of sale such as to bring the relationship between the defendant and the plaintiff within the ambit and application of the SOGA. Since there was no underlying contractual relationship, let alone one for the sale of goods, the SOGA simply does not apply. For ss 14, 27 and 30 of the SOGA to operate in the plaintiff's favour, the plaintiff bore the burden of proving that it paid the sum counterclaimed by the defendant for the goods (see paras 22, 35 & 38).

(3) The evidence shows that the defendant has not been paid, certainly not by Novanexus. Therefore the defendant is entitled to retain title in the goods. While the goods may have been delivered to the project site and may have been delivered through the different parties, figuratively and in theory pursuant to the various contracts, title however did not pass by virtue of this clause. The defendant could invoke the *nemo dat* principle to assert its legal ownership of the goods even though the goods have been delivered to the project site. Since no title has passed from the defendant, the plaintiff could never acquire title (see paras 47 & 49).

(4) Notwithstanding the terms of such agreement, there was no privity of contract between the defendant and the plaintiff. Despite the fact that Tech Art did not make payments to the defendant either through Novanexus, or directly to the defendant, the defendant would not be able to make a contractual claim, based on the supplementary agreement, against the plaintiff. Similarly, the plaintiff was not legally entitled to keep the goods on the basis that it had paid Tech Art, when at the end of the chain, the defendant was not paid in full for his goods delivered to the project site. Since there was no privity of contract between the plaintiff and the defendant, the plaintiff's claim for remedy ought to be made against Tech Art, but not the defendant (see paras 57–58).

[Bahasa Malaysia summary

Susulan perjanjian plaintif ('responden') dan Kerajaan Malaysia dan Universiti Teknologi Mara ('UiTM'), plaintif telah diberi konsesi untuk tempoh 23 tahun untuk membuat reka bentuk, pembangunan, pembinaan dan

penyelenggaraan kemudahan dan infrastruktur untuk kampus universiti di UiTM Rembau, Negeri Sembilan. Plaintif melantik Tech Art Sdn Bhd ('Tech Art') sebagai kontraktor utama. Tech Art kemudian mengeluarkan surat award kepada Novanexus Design Studio sebagai subkontraktornya. Tanpa diketahui oleh plaintif, Novanexus Design Studio telah membuat perjanjian dengan entiti lain ('Novanexus Design and Build Sdn Bhd') dan mereka kemudiannya secara bersama dan/atau berasingan membuat perjanjian dengan defendan ('perayu'). Aturan ini terbukti melalui pembelian dan penghantaran pesanan dan invois dan bekalan kerja-kerja pertukangan antara Novanexus dan defendan ('CSA'). Menurut defendan, ia menyerahkan barang ke tapak projek dan barang-barang itu kini berada dalam milikan plaintif. Plaintif berpendapat bahawa harta awam dalam barang yang dihantar oleh defendan ke kampus UiTM kini terletak hak pada plaintif. Plaintif memfailkan tuntutan di Mahkamah Tinggi dan menghujahkan bahawa mereka terpaksa memfailkan tindakan ini kerana defendan menyatakan keinginan untuk mengalihkan barang-barang dari tapak projek yang berpotensi menjejaskan plaintif yang terikat untuk menyerahkan milikan fizikal barang ke UiTM. Sebaliknya, defendan menegaskan bahawa mereka mempunyai hak untuk mengalihkan barangan tersebut. Defendan memfailkan tuntutan balas untuk bayaran atau penghakiman bagi nilai barang yang diserahkan kepada plaintif atau, secara alternatif, untuk pemulangan bawah undang-undang biasa dan s 71 Akta Kontrak 1950, atau pemulangan barang. Mahkamah Tinggi membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan dan sebahagian tuntutan balas:

(1) Hubungan defendan timbul bawah CSA, dibuat antara defendan dan Novanexus. Penyerahan barang milik tertuduh bawah CSA dibuat berdasarkan CSA. Penyerahan kepada Novanexus yang kemudiannya membekalkan barang-barang tersebut kepada Tech Art dan dari Tech Art kepada plaintif tidak, ipso facto, menyebabkan bekalan yang dibuat bawah sebarang hubungan kontrak antara defendan dan plaintif, bahkan tidak ada di bawah kontrak kerja-kerja PAM. Ini tanpa mengira hubungan Tech Art dengan defendan. Walau bagaimanapun, Tech Art tidak pernah menjadi penjual barangan ini; ia adalah kontraktor utama untuk CA (lihat perenggan 19).

(2) Perjanjian tambahan dan CSA adalah kontrak yang berlainan yang dibuat untuk tujuan yang berbeza. Perjanjian tambahan tersebut bukan kontrak jualan yang menjadikan hubungan antara defendan dengan plaintif dalam ruang lingkup dan pemakaian SOGA. Oleh kerana tiada dasar hubungan kontrak, apatah lagi satu kontrak jualan barangan, SOGA langsung tidak terpakai. Untuk ss 14, 27 dan 30 SOGA beroperasi memihak plaintif, plaintif menanggung beban membuktikan bahawa ia telah membayar jumlah yang dituntut balas oleh defendan untuk barangan (lihat perenggan 22, 35 & 38).

(3) Keterangan menunjukkan bahawa defendan belum dibayar, pastinya bukan oleh Novanexus. Oleh itu, defendan berhak memegang hakmilik barangan tersebut. Walaupun barangan tersebut mungkin telah dihantar ke tapak projek dan mungkin telah diserahkan melalui pihak-pihak berlainan, secara figuratif dan secara teori berdasarkan pelbagai kontrak, hakmilik tersebut tidak diserahkan berdasarkan klausa ini. Defendan boleh mengguna pakai prinsip *nemo dat* untuk menegaskan milikan sah barang-barang tersebut walaupun barang-barang tersebut telah dihantar ke tapak projek. Oleh kerana tidak ada hakmilik yang diserahkan oleh defendan, plaintif tidak boleh memperoleh hakmilik tersebut (lihat perenggan 47 & 49).

(4) Walau apa pun terma perjanjian itu, tidak ada persetujuan kontrak antara defendan dan plaintif. Walaupun Tech Art tidak membuat bayaran kepada defendan sama ada melalui Novanexus, atau secara langsung kepada defendan, defendan tidak boleh membuat tuntutan bawah kontrak, berdasarkan perjanjian tambahan, terhadap plaintif. Plaintif juga tidak berhak, secara sah, untuk menyimpan tersebut dengan syarat ia telah membayar Tech Art, sedangkan di penghujungnya, defendan tidak dibayar sepenuhnya untuk barang-barangnya yang diserahkan ke tapak projek. Oleh kerana tidak ada priviti kontrak yang sah antara plaintif dan defendan, tuntutan plaintif untuk remedi harus dibuat terhadap Tech Art, tetapi bukan defendan (lihat perenggan 57–58).]

Notes

For cases on building contract, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6764–6767.

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation) [1987] 2 MLJ 57, SC (refd)

Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118; [1967] 1 LNS 161, PC (refd)

Tanjung Teras Sdn Bhd v Kerajaan Malaysia [2015] MLJU 2161; [2015] 9 CLJ 1002, CA (refd)

Legislation referred to

Contracts Act 1950 s 71

Sale of Goods Act 1957 ss 2, 14, 14(a), (b), (c), 19, 27, 27(1), 30, 30(1)

Appeal from: Civil Suit No WA-22NCVC-642–10 of 2016 (High Court, Kuala Lumpur)

Vishnukumar a/l R Visvanathan (Caroline Mary George with him) (Syed Alwi, Ng & Co) for the appellant.
Jasvinjit Singh (Jasvinjit & Co) for the respondent.

Yeoh Wee Siam JCA (delivering judgment of the court):

APPEAL

[1] This in an appeal by the defendant ('the appellant') against the decision of the High Court given on 17 May 2017, after a full trial, which allowed the claim of the plaintiff ('the respondent') and dismissed the counterclaim of the appellant with costs of RM38,000.

SALIENT FACTS

[2] The salient facts as set out by the learned High Court judge ('judge') can be summed up as follows.

[3] Pursuant to a concession agreement dated 21 February 2013 entered into between the plaintiff of the one part and the Government of Malaysia and Universiti Teknologi Mara ('UiTM') of the other part ('the concession agreement') (AR Pt A and B Vol 1 at Pt C pp 259–269), the plaintiff was granted a concession for a period of 23 years (including the construction period) to carry out the design, development, construction and maintenance of the facilities and infrastructure (as defined therein) and carry out the asset management services (as defined therein).

[4] The aforesaid facilities and infrastructure refer to a university campus for use by UiTM in Rembau, Negeri Sembilan, on a parcel of land then held under Geran 74041, Lot 472, Mukim Kundor, District of Rembau, State of Negeri Sembilan measuring approximately 80 acres ('the UiTM campus') or ('the project site').

[5] It was part of the plaintiff's obligation under the concession agreement to supply 'loose and built-in furniture' to the UiTM campus. In order to implement the obligations under the concession agreement, the plaintiff appointed Tech Art Sdn Bhd ('Tech Art') as the main contractor. The appointment of Tech Art was done via a letter of award dated 8 May 2013 (AR Pt C pp 270–284).

[6] Pursuant to the letter of award, it was Tech Art's obligation to supply 'loose and built-in furniture/soft finishing and special equipment'. Thereafter, Tech Art appointed specialist contractors to provide various services and/or to supply the relevant goods. Hence, Tech Art in turn issued a letter of award

dated 2 January 2014 to one Novanexus Design Studio to undertake the 'Design and Build-Loose and Built-in Furniture and Soft Furnishing' works for a contract sum of RM7.3m (AR Pt C pp 285– 301).

[7] Unknown to the plaintiff, Novanexus Design Studio on its part entered into arrangements with another entity, namely Novanexus Design and Build Sdn Bhd and they then jointly and/or severally entered into arrangements with the defendant, by which the defendant would supply the furniture or goods ('goods') (Novanexus Design Studio and Novanexus Design & Built Sdn Bhd are referred to collectively as 'Novanexus'). These arrangements are evidenced by purchase orders, delivery orders and invoices and a supply and carpentry work agreement dated 20 June 2016 between Novanexus and the defendant ('the CSA') (AR Pt C pp 311–343).

[8] The defendant claims that it delivered the goods to the project site between 3 July–8 September 2016. The goods are now in the plaintiff's possession.

[9] By this action, the plaintiff contends that the general property in the goods delivered by the defendant to the UiTM campus (as alleged by the defendant) is now vested in the plaintiff. According to the plaintiff, the term 'general property' in goods is synonymous with 'title'.

[10] The plaintiff maintains that they were forced to file this action as the defendant intimated a desire to remove the goods from the project site which would have been a potentially disastrous event for the plaintiff who was bound to deliver the physical possession of the goods to UiTM. On the other hand, the defendant asserts that they have a right to remove the goods and, in this regard, rely on a 'retention of title' clause found in cl 9 in the CSA.

THE PLAINTIFF'S CLAIM

[11] In its statement of claim, the respondent claims against the appellant the following reliefs:

a. Suatu deklarasi bahawa Plaintif tidak terhutang dengan Defendan didalam apa jua jumlah pun;

b. Suatu deklarasi bahawa hakmilik (title) didalam apa jua barangan yang dihantar serah dan kini didalam pegangan Plaintif adalah kepunyaan sah Plaintif;

c. Defendan olehnya sendiri, ejen atau pekhidmatnya atau selainnya ditahan dan suatu injunksi dengan ini diberikan menahannya daripada memasuki

tapak Projek tersebut atau dalam apa jua cara sekalipun cuba untuk mengambil balik apa jua barangan daripada tapak projek tersebut tanpa kelulusan Plaintif;

d. Bahawa gantirugi termasuk gantirugi berganda dan gantirugi teladan ditaksirkan oleh Mahkamah yang Mulia ini dan diperintahkan dibayar oleh Defendan kepada Plaintif;

e. Faedah atas apa jua gantirugi yang mungkin ditaksirkan dibayar pada kadar 5% setahun atas dasar terkompoun setiap bulan dari tarikh pemfailan Writ disini sehingga tarikh penyelesaian penuh;

f. Kos tindakan ini atas dasar peguamcara-anak guam;

g. Apa jua atau lain relief yang difikirkan wajar dan suai manfaat diberikan;

THE APPELLANT'S COUNTERCLAIM

[12] The appellant made a counterclaim, inter alia, for payment of or judgment for the value of the goods delivered to the respondent or, alternatively, for restitution under common law and s 71 of the Contracts Act 1950, or return of the goods. In para 31 of its counterclaim against the respondent, the appellant prays for the following orders and reliefs:

(a) Judgment for the sum of RM920,494.86;

(b) In the alternative Judgment by way of and order for restitution for the sum of RM920,494.86;

(c) In the alternative that the Plaintiff do deliver up to the Defendant all goods delivered by the Defendant under the 'Supply & Carpentry Works Agreement' dated 20.6.2016 and particularized under the 'Particulars of Purchase Orders, Invoices and Delivery Orders';

(d) Interest at 5% per annum on the sum of RM920,494.86 from the date of service of this Defence and Counterclaim to the date of judgment and thereafter interest at 5% per annum on the judgment sum until full and final settlement;

(e) Costs of the Counterclaim; and

(f) Such further or other relief that this Honourable Court deems fit and proper to grant.

OUR DECISION

[13] After hearing the appeal on 13 December 2017, we made a unanimous decision to allow the appellant's appeal and consequently, the counterclaim.

A GROUNDS OF DECISION

The nature of the concession agreement and its position vis a vis the appellant

B **[14]** In submissions before us, the appellant contends that the Sale of Goods Act 1957 ('the SOGA') has no application because the concession agreement under which the respondent contracted with the Government of Malaysia and with UiTM is a standard form PAM works contract (with quantities) 2006. This was similarly the case with the contract between the respondent and Tech Art and Tech Art with Novanexus. PAM Works contracts as is the case with C other standard form construction contracts are comprehensive contracts where there are specific provisions dealing with the issue of title, passing of title and conditional delivery. Consequently, there was no room for application of the SOGA which in any case is mercantile law which is incompatible with a PAM works contract. D

[15] We are unable to properly consider this argument as this was not actually a pleaded issue between the parties. Be that as it may, we observe that nowhere in the respondent's statement of claim and in the appellant's statement E of defence is it pleaded that the concession agreement is a PAM works contract. The complete document of the concession agreement was not produced in court. Only part of the concession agreement ie ten pages thereof was exhibited (AR Pt A and B Vol 1 at Pt C pp 259–269). From the ten pages made available to the court at trial, it cannot be immediately ascertained whether the F concession agreement is a PAM works contract.

[16] On the other hand, we can safely say that both the contracts between the respondent and Tech Art, and between Tech Art and Novanexus are a PAM works contract. In the case of the contract with Tech Art, this is evident from G the letter of award seen at appeal record ('AR') Vol 3 Pt B pp 698–750 and the letter of award dated 2 January 2014 seen at AR Pt C pp 285–301. There also appears to be no dispute on this.

H **[17]** In our view, regardless whether or not this is a standard PAM works contract (with quantities) 2006, what may be reasonably deduced from the pleadings and the documents presented at trial is that the relationship between the respondent and Tech Art and between Tech Art and Novanexus were purely contractual. That contractual relationship emanates from an agreement not I only to construct, design, develop and maintain facilities and infrastructure as defined under the concession agreement, but also to carry out asset management services also as defined in the concession agreement. That concession agreement is for a period of 23 years with the various parties,

subsequent to the respondent, who have been subcontracted as nominated subcontractors to do particular aspects of the work under the concession agreement.

[18] But, as far as the relationship between the immediate parties in this appeal is concerned, it is undisputed that there is no contractual relationship between them. The respondent has even pleaded that to be the case at para 13 of its statement of claim. In fact there is also no contractual relationship either between the appellant and Tech Art.

[19] The appellant's relationship arises under the CSA, made between the appellant and Novanexus. The appellant's delivery of the goods contracted under the CSA was made pursuant to the CSA. Such delivery to Novanexus who in turn 'supplies' the goods, namely the furniture, to Tech Art and from Tech Art to the respondent does not, ipso facto, render the supply one made under any contractual relationship between the appellant and the respondent, not even one under the PAM works contract. This is regardless of Tech Art's relationship with the appellant. In any case, Tech Art was never a seller of the goods; it was the main contractor for the concession agreement pursuant to the letter of award of 9 May 2013.

The supplementary agreement between Novanexus and the appellant

[20] The supplementary agreement will be dealt with at two levels: in relation to the respondent's claim, and as one of the basis for the appellant's counterclaim.

[21] Taking it in the first respect, the question that next arises is whether by virtue of the existence of the supplementary agreement dated 13 September 2016 made between the appellant and Novanexus, there is then a contractual relationship between the appellant and the respondent. Under cl 2(ii) of the supplementary agreement, the appellant is entitled to make a claim for the sum of RM920,424.86 directly against Tech Art. In the event Tech Art does not pay, the appellant is granted full authority and approval under cl 2(vi), to claim that sum directly from the respondent. The operation of this supplementary agreement is not in dispute.

[22] It is our considered view that having examined the terms of the supplementary agreement, we remain firm on our earlier conclusions. The supplementary agreement and the CSA are entirely different contracts made for different purposes. The supplementary agreement is far from being a contract of sale such as to bring the relationship between the appellant and the respondent within the ambit and application of the SOGA.

[23] The learned judge did not address the respondent's claim in the manner that we have. Instead, His Lordship took both the claim and counterclaim together, and considered that the question of whether the *Romalpha* or retention of title clause in cl 9 of the CSA applies depends on whether the clause had been brought to the attention of the respondent. His Lordship found that the respondent was not aware of cl 9 of the CSA, neither was it even aware of the existence of the appellant. Consequently, the clause did not operate to bind the respondent. The High Court went further to find that the supplementary agreement 'cannot bind the plaintiff in any way'.

[24] It was erroneous for the learned judge to have analysed the claim and the counterclaim in those terms. Since His Lordship was prepared to recognise that the supplementary agreement was between the appellant and Novanexus, His Lordship ought to have reminded himself of what the underlying relationship between the appellant and the respondent was, if any, before proceeding to consider the application or otherwise of ss 2, 14 and any other provisions of the SOGA that were relied on by the respondent.

[25] Instead, at para 48 of his judgment, the learned judge said that the 'issue here is that pursuant to s 2 of the SOGA, non-payment by the purchaser does not mean that there is no sale' and then proceeded to find for the respondent at paras 48–49 of his judgment.

[26] In our view, the learned judge was obliged to determine whether the Act even applies at all before considering whether specific provisions of the SOGA had been breached. Had His Lordship properly directed himself, His Lordship would have found that there was no basis, in law and on the facts, for the application of the Act.

Whether the SOGA applies

[27] The learned judge allowed the respondent's claim based mainly on the application of ss 14, 27(1) and 30 of the SOGA which provide as follows:

> 14 Implied undertaking as to title; etc.
>
> In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —
>
> (a) an implied condition on the part of the seller, that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
>
> (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;

(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

27 Sale by person not the owner

(1) Subject to this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell:

Provided that where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

30 Seller or buyer in possession after sale

(1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale, pledge, or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

[28] The learned judge considered the submissions of the respondent regarding the above provisions and stated his views which can be summed up as follows:

[29] The respondent contends that it received the goods bona fide from Tech Art without notice of the appellant's claim thereto. By relying on s 14 of the SOGA, the respondent is entitled to assume that Tech Art and Novanexus (the sub contractor) had the right to sell the goods and the property in the goods therein passes at the time of delivery. Therefore, the respondent will have quiet possession of the goods free from any charge or encumbrance in favour of any third party not declared or known to the respondent before it received the goods.

[30] Based on s 27 of the SOGA, the respondent contends that the goods were sold by a person who is not the owner thereof (Novanexus), and who does not sell them under the authority or with the consent of the owner (the appellant). The buyer (Tech Art) acquires no better title to the goods than the seller (Novanexus) had, unless the owner (the appellant) of the goods is precluded by his conduct from denying the seller's authority to sell. The proviso to s 27(1) is a statutory form of estoppel and applies to the present facts where the appellant unconditionally allowed the goods to be delivered to the project site and acting on the faith of the same, the project architect has since certified the works as completed on 23 September 2015. The project site has now been handed to the respondent who in turn issued a certificate of availability to UiTM on 5 October 2016. This triggered a joint inspection of the facilities and acceptance of the same, save for some defects which had to be rectified. The respondent also relies on the proviso to s 27 of the SOGA which provides that a mercantile agent (Novanexus) is, with the consent of the owner (the appellant), in possession of the goods. Any sale by him (Novanexus) when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorised by the owner (the appellant) of the goods to make the same, provided that the buyer (Tech Art/the respondent) acts in good faith and has not at the time of the contract of sale, notice that the seller (Novanexus) has no authority to sell.

[31] In order to rely on the proviso, the respondent takes the position that Novanexus is a 'mercantile agent'. The respondent then relies on s 30(1) of the SOGA.

[32] Based on s 30(1) of the SOGA, the respondent contends that where a person (the appellant/Novanexus), having sold goods, continues or is in possession of the goods, the delivery or transfer by that person (the appellant/Novanexus) of the goods under any sale to any person (Tech Art/the respondent) receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer (Novanexus) were expressly authorised by the owner (the appellant) of the goods to make the same.

[33] Aside from the argument that the parties are bound by the standard terms as found in PAM works contract 2006, the appellant reiterated that the relationship between the parties, if any, is not a 'goods sale transaction', and that Novanexus was never a mercantile agent within the meaning of the Act. In any case, pursuant to s 19 of the SOGA, regard must be given to the terms of the underlying contract between the parties, the conduct of the parties and the circumstances of the case.

[34] The respondent had relied on ss 14, 27 and 30 of the SOGA to

maintain its claim for the declaratory orders at para 31 of the statement of claim.

[35] Having made our observations on the lack of any legal contractual relationship between the parties in this appeal, it is apparent that the SOGA has no application to the facts of this case. Since there is no underlying contractual relationship, let alone one for the sale of goods, the Act simply does not apply. This is a clear misdirection on the part of the learned judge and since the respondent's claim was allowed on this premise, the appeal must be thus allowed.

[36] In any event, regarding s 14 of the SOGA, we are of the view that there must be a sale of the goods by the seller to the buyer before the implied condition in para (a) and the implied warranties in paras (b) and (c) of the same section can be enjoyed by the buyer. In this case, it is an undisputed fact that the respondent (purported buyer) did not have a contract of sale for the goods (the furniture) with the appellant (purported seller). There is no proof of payment of the sum of RM920,494.86, as claimed by the appellant in its counterclaim, by the respondent to prove that the sale of the goods went through and therefore the general property of the same has passed to the respondent.

[37] Regarding s 27 of the SOGA, the respondent cannot avail itself of the proviso thereto since the respondent or 'mercantile agent' does not have 'the consent of the owner' (the appellant) to be 'in possession of the goods or of a document of title to the goods'. By the fact that the appellant made the counterclaim, it is ample proof that without being paid the sum of RM920,494.86 by the respondent, the appellant did not consent to the same.

[38] Thus, in our view, for ss 14, 27 and 30 of the SOGA to operate in the respondent's favour, the respondent bears the burden of proving that it has paid the sum counterclaimed by the appellant for the goods. At the time of the trial before the judge, the respondent maintained that to that date, it had paid Tech Art a sum of approximately RM6.04m out of the total contract sum of RM6.8m. A further sum of RM500,000 was the design fees due to Novanexus. According to the respondent, the retention amount is 10% of the same up to a maximum of 5% of the contract sum, meaning that apart from the RM6.04m, there is a further amount of about RM365,000 which has been certified as due and payable to Novanexus Design Studio. Thus, the value paid out to Novanexus is approximately RM6.37m. The surplus sum in respect of the goods is approximately RM430,000. The respondent contends that they have already incurred more than that sum in obtaining alternative supplies due to the default by Novanexus. At the time of hearing of the appeal, according to the submissions of learned counsel for the respondent, even though the respondent had paid RM6,737,900 for the goods, Tech Art still owes them approximately

RM1.8m, but another RM562,000.00 is still owed by them to Novanaxus (see annexure to witness statement of respondent's project director in AR Vol 2 Pt B and Vol 1 Pt C p 207).

[39] We observe from the respondent's payments made up to the time of the trial, that there are payments to Tech Art, and to Novanexus through Tech Art. However, it is noted that there were no payments by the respondent directly to the appellant. Despite the fact that the respondent had not paid the appellant for the goods, the judge held, inter alia, in para 48 of his grounds of judgment as follows:

> In so far as the issue of payments that are to be made by the plaintiff to Tech Art Sdn Bhd is concerned, the view that I take is that although there is no documentary evidence that the plaintiff does not owe Tech Art Sdn Bhd, it is clear from the evidence of PW1 that the final quantum is yet to be determined as the 'final audit' has not been completed. Whatever may be the case, the issue is solely between the plaintiff and Tech Art Sdn Bhd and is of no concern to the defendant. The defendant may or may not have recourse to Tech Art Sdn Bhd but that is a different matter altogether and I make no comment on this either way as it may well be the subject of another action in the future. In any event, whether the plaintiff has fully settled its payment obligations with Tech Art Sdn Bhd or not, the issue here is that pursuant to s 2 of the SOGA, non-payment by the purchaser does not mean that there is no sale. In so far as the conduct of the defendant is concerned, I take the view that they are precluded from asserting any title to the goods that were delivered because the plaintiff was not aware of the existence of the defendant as an end supplier and more importantly, the plaintiff is not a party to the supply and carpentry agreement which contains the retention of title clause and cannot therefore be bound by those terms ...

[40] With respect, we are of the considered opinion that the learned judge erred by holding that even with non-payment by the purchaser, there is a sale pursuant to s 2 of the SOGA. From our perusal of the said section, we note that s 2 is the interpretation section in the SOGA where certain words or terms have been defined eg 'buyer', 'delivery', 'future goods', 'property', 'specific goods' etc. Section 2 does not contain substantive provisions to expressly state that even with non-payment there is a sale.

[41] For the reasons expressed, the provisions of the SOGA as relied upon by the respondent do not apply to the present case. The respondent's claim therefore was not proved and ought to be dismissed.

The effect of the retention of title clause

[42] From the submissions of both parties, we conclude that the appellant's contract with Novanexus, ie the (CSA), is a sale of goods contract.

[43] The appellant relies on the *Romalpha* or retention of title clause in cl 9 of the CSA. That clause provides as follows:

> VESTING OF GOODS, MATERIALS AND SPECIFICATIONS
>
> *All goods, materials and Specifications* which form part of the Supply of Goods and Services and the Plans and Specifications as described in Schedule 2 (hereinafter, collectively, the 'Goods') *shall become the property of The Contractors upon delivery to the Project site, and upon payment of The Contract Sum (or such part thereof attributable to such Goods) being made to the Sub-Contractor*, and shall not be removed from the Project Site without the prior written consent of The Contractors. Goods, materials and specifications yet to be delivered to the Project Site for incorporation into the Supply of Goods and Services shall become the property of The Contractors when any sum is included in a tax invoice in respect thereof *and upon payment of the Contract Sum (or such part thereof attributable to such Goods) being made to the Sub-Contractor*, and thereafter the Sub-Contractor shall not remove or cause or permit the same to be moved from the Project Site or elsewhere without the prior written consent of The Contractors. (Emphasis added.)

(Note: 'contractor' in the above cl 9 refers to Novanexus, and 'subcontractor' refers to the appellant.)

[44] The respondent and Tech Art took the position that they had no knowledge of cl 9 of the CSA. The respondent submits that at no time prior to the final delivery of the goods on 8 September 2016 did the appellant make its existence known to the respondent. The respondent only came to know of the appellant's existence and claim to the goods on 5 October 2016 when the appellant forwarded several documents, including the CSA, to the respondent.

[45] It is clear from the position taken by the respondent and Tech Art that they are not parties to the CSA which was executed between Novanexus and the appellant. Thus, the CSA binds only Novanexus and the appellant. From cl 9, it is clear, as asserted by the appellant, that the goods become the property of 'the contractors' (Novanexus) 'upon payment of the Contract Sum' 'being made to the Sub-Contractor' (the appellant). For as long as the appellant is not paid by Novanexus the contract sum for the goods, the appellant would continue to have retention of title in the goods as provided in cl 9 of the CSA.

[46] In this case, there is no evidence that Novanexus had paid the appellant the sum of RM920,494.86 for the goods delivered by the appellant to the project site. Therefore, Novanexus, let alone Tech Art and the respondent, has no property or title to the goods.

[47] Although the supplementary agreement is not for a sale of any goods, the CSA is a sale of goods contract to which the SOGA applies and cl 9 is consistent with the terms of s 19 of the Act. The evidence shows that the appellant has not been paid, certainly not by Novanexus. Therefore the

appellant is entitled to retain title in the goods under cl 9. While the goods may have been delivered to the project site and may have been delivered through the different parties, figuratively and in theory pursuant to the various contracts, title however does not pass by virtue of this clause. This then brings us to the alternative defence that the appellant relies on, namely the *nemo dat* principle.

Nemo dat quod non habet ('nemo dat') principle

[48] In the alternative, the appellant relies on the common law principle of *nemo dat* ('no one gives who possesses not').

[49] In view of our earlier ruling that the provisions of the SOGA do not apply in the context of the appellant and the respondent, that to date the appellant has not been paid by any party and due to the presence of cl 9 of the CSA, we are of the opinion that the appellant can invoke the *nemo dat* principle to assert its legal ownership of the goods even though the goods have been delivered to the project site. Since no title has passed from the appellant, the respondent could never acquire title.

Counterclaim

[50] The appellant's counterclaim for the sum of RM920,494.86 is based, inter alia, on the terms of the supplementary agreement.

[51] As pleaded by the appellant, by a supplementary agreement dated 13 September 2016, between Novanexus Design Studio and Novanexus Design and Built Sdn Bhd as joint contractors and the appellant ('supplementary agreement') (AR Pt C pp 386–391), it was agreed that the terms of payment under cl 3.2.1 of the principal agreement (ie the CSA dated 20 June 2016) be varied and that the initial agreed sum of RM952,842.28 be reduced by RM52,300 and be increased by a variation order by RM19,952.58 thus producing RM920,494.86 as the agreed sum due owing. It was further agreed as follows:

(a) at sub-cl 2(i), that the appellant had fully complied with its obligations under the principal agreement; and

(b) at sub-cl 2(vi), that in the event no payment is received from Tech Art, then the appellant would be at liberty to claim the sums due directly from the respondent.

[52] By a letter dated 10 August 2016 issued by Nova Nexus Design Studio, a request had been made by them to their principal, ie Tech Art, for Tech Art to make direct payments to Nova Nexus Design Studio suppliers and contractors who have remained unpaid by Nova Nexus Design Studio.

[53] By their own admission in an undated letter to Nova Nexus Design Studio, Tech Art had admitted that they were aware that the subcontractors appointed by Nova Nexus Design Studio had not been paid leading to delays in the completion of the project.

[54] By a letter dated 13 September 2016, Nova Nexus Design Studio granted written authority to Tech Art to make payments due to the appellant directly to the appellant without going through Nova Nexus Design Studio for a mutually varied sum amounting to RM920,494.86 only. In the event that Tech Art was unable to make the payments due, then the appellant could proceed directly to the respondent to obtain the payments due.

[55] By a letter dated 3 October 2016, the respondent was informed by the appellant of the approvals given by Nova Nexus Design Studio and the necessary invoices and supporting documents were forwarded by the appellant to the respondent together with a statutory declaration dated 4 October 2016.

[56] The appellant's tax invoice dated 20 September 2016 bearing No NOVA-2016–09–001 for the sum of RM920,494.86 issued to Nova Nexus Design Studio and Novanexus Design and Built Sdn Bhd remains unpaid.

[57] From a careful perusal of the supplementary agreement, it is clear that notwithstanding the terms of such agreement, there is no privity of contract between the appellant and the respondent. Thus, despite the fact that Tech Art did not make payments to the appellant either through Novanexus, or directly to the appellant, the appellant would not be able to make a contractual claim, based on the supplementary agreement, against the respondent. Similarly, the respondent is not legally entitled to keep the goods on the basis that it had paid Tech Art, when at the end of the chain, the appellant was not paid in full for his goods delivered to the project site.

[58] Since there is no privity of contract between the respondent and the appellant, the respondent's claim for remedy ought to be made against Tech Art, but not the appellant.

Whether s 71 of the Contracts Act 1950 ('the CA') applies

[59] The appellant further relies on s 71 of the CA which provides as follows:

> 71 *Obligation of person enjoying benefit of non-gratuitous act*
>
> Where a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. (Emphasis added.)

[60] In *Tanjung Teras Sdn Bhd v Kerajaan Malaysia* [2015] MLJU 2161; [2015] 9 CLJ 1002 the Court of Appeal considered the Privy Council case of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118; [1967] 1 LNS 161 (PC) and held that to succeed in a claim under s 71 of the CA, four conditions must be fulfilled, namely that the doing of the act:

(a) must be lawful;

(b) must be done for another person;

(c) must not be intended to be done gratuitously; and

(d) must be such that the other person enjoys the benefit of the act or the delivery.

[61] In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 at p 477, the Federal Court observed that in the case of *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation)* [1987] 2 MLJ 57 the Supreme Court held that the trial judge had rightly given judgment under s 71 of the CA and considered that all the four conditions in that section had been satisfied and the respondent had therefore established their claim under the said section.

[62] The appellant submits that based on the factual matrix of the matter before this court, the goods were supplied and delivered by the appellant to the project site wherein the respondent was the concessionaire to the project. The fact that the appellant was to receive payment from Novanexus or the joint contractors does not alter the fact that the appellant never intended the works ie the supply and delivery of the furniture, to be done gratuitously. The respondent is enjoying the benefit of the said delivery, and the certificate of practical completion has since been issued. Therefore, since the conditions to s 71 of the CA have been fulfilled, compensation must be paid to the appellant as the respondent has enjoyed the benefit of the appellant's act.

[63] The learned judge ruled, however, that there is no evidence that when the goods were delivered by the appellant to the project site, that they were doing so for the benefit of the respondent as 'the other'. If anything, 'the other' in the present context is Novanexus, with whom the appellant had a contractual relationship. As such, the learned judge concluded that one of the important criteria for a claim under s 71 of the CA is absent.

[64] With respect, we are of the view that s 71 of the CA can be properly invoked by the appellant, and we agree with the above submissions of the appellant. It is true, as stated by the learned judge, that the appellant has a contractual relationship with Novanexus and the appellant should be paid by Novanexus for any delivery of goods to Novanexus. In this case, according to

the CSA, the appellant was to deliver the goods to the respondent at the project site, but payment must be made to the appellant by Novanexus. Since no such payment has been made by Novanexus, it follows that the appellant is entitled to compensation, or be restored the goods delivered (see *Dream Property*, and *Tanjung Teras*). Therefore, if the respondent wishes to retain the goods or the benefit, the respondent has to pay the appellant for the amount claimed by the appellant. With respect, we cannot agree with the learned Judge's reasoning as it would render s 71 meaningless. Section 71 is precisely to facilitate recovery against a party with whom there is no contractual relationship but who has nevertheless received the benefit of the appellant's lawful act which was never intended to be done gratuitously. This was clearly explained in *Dream Property* and *Tanjung Teras*.

Unjust enrichment

[65] Although it was not considered by the learned judge, we agree with the submissions of the appellant that the respondent had received the goods supplied in good order and had claimed full possession and ownership over the goods thus receiving a benefit. The appellant has not been paid by any party, including the respondent. The retention of the goods delivered without payment being made to the appellant tantamounts to unjust enrichment of the respondent for which the appellant ought to be allowed restitution by way of its counterclaim (see also *Dream Property*).

CONCLUSION

[66] After careful consideration of the submissions of both learned counsels and a perusal of the record of appeal, we find that there are merits in this appeal. We are satisfied that there are appealable errors to warrant our appellate intervention.

[67] In our opinion, the respondent has not discharged its burden of proving its claim. We do not find that title to the goods has passed even if this were a case of sale of goods simpliciter, which we do not find to be the case. Clearly, there is no evidence of payment of the goods by the respondent to the appellant.

[68] Accordingly, we allowed the appeal and set aside the decision and order of the High Court.

[69] Regarding the appellant's counterclaim, based on the application of the nemo dat principle, and s 71 of the CA, and on the principle restitution for unjust enrichment, we allowed the counterclaim in prayers 31(a) and 31(d) (AR Vol 1 Pt A p 64). We awarded costs of RM45,000 to be paid by the

respondent to the appellant, subject to payment of the allocator fee. The deposit is to be refunded to the appellant.

Appeal and counterclaim allowed in part.

Reported by Afiq Mohamad Noor